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CRYSTAL DELLIGATTI

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

In re:	)	Case No.: 11-32059-TEC
)	
	)	Chapter: 13
EDWARD P. STURT-PENROSE and)	
HEATHER L. GIBBONS,	)	MOTION FOR RELIEF FROM STAY
Debtors.	)	[11 U.S.C. §§ 362 and 1325, 28 U.S.C. §§
	)	157 and 1334 and Bankruptcy Rule 4001]
)	
CRYSTAL DELLIGATTI	)	HEARING:
Movant	)	Date: August 8, 2011
	)	Time: 1:00 PM
v.	)	Place: U.S. Bankruptcy Court
	)	235 Pine Street, 23rd Floor
	)	San Francisco, CA 94104
EDWARD P. STURT-PENROSE and)	
HEATHER L. GIBBONS,)	
Respondents	)	<i>The Honorable Thomas E. Carlson</i>

TO: THE HONORABLE THOMAS E. CARLSON, JUDGE OF THE UNITED STATES BANKRUPTCY COURT, THE UNITED STATES TRUSTEE, THE CHAPTER 13 STANDING TRUSTEE, DAVID BURCHARD, DEBTORS, DEBTORS' COUNSEL, AND OTHER INTERESTED PARTIES:

COMES NOW, this 25th day of July, 2011, Movant Crystal Delligatti, hereinafter ("Movant") by and through her counsel of record, Selwyn D. Whitehead, Esq., and hereby files this Motion For Relief From Stay, alleging the following in support thereof:

COUNT I – RELIEF FROM STAY – CAUSE – BAD FAITH

1. This court has jurisdiction over the subject matter of this Motion pursuant to provisions of 28 United States Code §§ 157, 1334, and 11 United States Code §§ 362 and 1325.

2. The Debtors/Respondents are Edward P. Sturt-Penrose And Heather L. Gibbons (hereinafter “Debtors”) with an address of 673 Kansas Street, San Francisco, CA 94107.

3. The Movant is Crystal Delligatti, by and through her counsel of record, Selwyn D. Whitehead, Esq., with an address of 4650 Scotia Avenue Oakland, CA 94605.

4. The Debtors filed for protection under Chapter 13 of the United States Bankruptcy Code on May 27, 2011.

5. On June 18, 2010, Movant filed her complaint for hostile environment sexual harassment, failure to prevent discrimination and harassment, retaliation and wrongful termination in violation of public policy in the Superior Court of the State of California for the County of San Mateo, as Case No. CIV 496101. Andrew M. Agtagma, Esq. represents the Movant in her State Court proceeding. The following brief procedural chronology is stated in support of Movant’s contentions:

a. Sturt-Penrose answered the complaint on August 6, 2010, and in the ensuing months, the parties exchanged various written discovery requests. Additionally, Sturt-Penrose commenced Movant’s deposition on October 20, 2010 and completed it on November 19, 2010.

b. After the initial case management conference, which was also on October 20, 2010, the parties agreed to mediate the case. Mediation was scheduled with Arthur Siegel, Esq. on March 28, 2011. In recommending that only a half-day mediation be scheduled—as opposed to a whole-day mediation—defense counsel, Derrick Sturm Esq., remarked that the mediation “shouldn’t take long.”

c. The import of this comment became clear a week prior to the mediation, when Sturm informed Movant’s Counsel Agtagma that Sturt-Penrose’s corporation, VistaPost intended to file bankruptcy later that week. Sturm stated that Sturt-Penrose was considering bankruptcy as well. The mediation came and went without the parties settling the case.

d. Movant noticed the deposition of Sturt-Penrose to take place on April 11, 2011, after it was clear that Sturt-Penrose was not serious about trying to settle the case at mediation. The day before the deposition, when Movant’s Counsel Agtagma called to confirm Sturt-Penrose’s deposition, defense counsel asked to have the deposition rescheduled. It was

1 rescheduled for April 27, 2011. During the April 27, 2011, deposition, Sturt-Penrose reiterated
2 that VistaPost would be filing bankruptcy “within 48 hours.” He reiterated throughout that
3 VistaPost was no longer in operations, but testified that he was now working for a company that
4 he called “Nova Group.”

5 e. Sturt-Penrose denied that this latter company is a continuation of the
6 former, but during his deposition, he admitted that the new company is located at the same
7 address, hired three-fourths of VistaPost’s staff when it took over, and retained some of the same
8 clientele. A subsequent investigation identified the new company as Novavista Fulfillment,
9 L.L.C. (“Novavista”).

10 f. A mandatory settlement conference was held on May 12, 2011 before the
11 Honorable Steven Dylina of San Mateo Superior Court. At the conference, Movant’s Counsel
12 Agtagma informed Defense Counsel Sturm that Movant would seek leave to amend the
13 complaint to add Novavista as a defendant. Sturm responded that the new company would be
14 winding down as well, even though it had only begun operations a few months earlier. Sturt-
15 Penrose also reiterated that a bankruptcy petition was being filed that day. Judge Dylina asked
16 Sturt-Penrose to fax proof of the bankruptcy filing to the Court and had the parties wait until it
17 was received. Judge Dylina let the parties go after one hour, despite not having received the
18 requested fax.

19 g. The following day, Movant’s Counsel Agtagma received a notice of stay
20 as the result of VistaPost’s Chapter 7 bankruptcy filing. The trial, which was scheduled on May
21 31, 2011, was vacated accordingly. (Sturt-Penrose then filed his Chapter 13 petition a few weeks
22 later on May 27, 2011.)

23 6. These acts support Movant’s contention that Debtors filed bankruptcy for the sole
24 purpose of eliminating the debtor’s obligation to pay Movant for the pending Hostile
25 Environment, Sexual Harassment, Failure To Prevent Discrimination And Harassment,
26 Retaliation And Wrongful Termination In Violation Of Public Policy Litigation; a clear showing
27 that Debtors’ case filing does not satisfy the requirements of 11 U.S.C. §1325 (a) (7) in that the
28 action of the debtor in filing the petition, as set forth above, was not in good faith. Also, Movant
29 contends that in that Debtor’s Plan does not satisfy the requirements of 11 U.S.C. §1325(a) (3) in
30 that the Plan has not been proposed in good faith. Good faith is not able to be established in this
31 case for several reasons: 1) the income and expenses being reported on the Schedules is

1 anticipated rather than actual; 2) the monthly net income reported on Schedules J is \$499.00; and
2 3) the disposable income reported on the Means Test is \$1415.50. The Plan payment being
3 offered is \$600 for the first 6 months, \$1,000.00 for the next 6 months, and \$1,600.00 for the last
4 48 months, which does not address how the debtors can realistically fund the Plan over the next
5 60 months and be successful.¹

6 7. Debtors caused willful and malicious injury to another entity or to the property of
7 another entity, namely the Movant. Willful and malicious injury is evident to the Movant by not
8 only the bankruptcy filing of Debtors personal bankruptcy but also the bankruptcy filing of
9 VistaPost, LLC filed in May 2011, Northern District Case Number 11-31854 and the fact that the
10 new company, Novavista would be winding down as well, even though it had only begun
11 operations a few months earlier.

12 8. The dissolution of VistaPost and thus filing of Debtors bankruptcy shields the
13 Debtors and VistaPost from the lawsuit, thereby eliminating the Debtors obligation to settle with
14 Movant for the pending Hostile Environment, Sexual Harassment, Failure To Prevent
15 Discrimination And Harassment, Retaliation And Wrongful Termination In Violation Of Public
16 Policy Litigation.

17 9. As the Ninth Circuit explained: “Under the Bankruptcy Code, *when a debtor files*
18 *his petition* for bankruptcy, he receives the benefit of an *automatic stay* that is imposed on his
19 creditors, . . . preventing them from proceeding to collect on their claims. . . . Under Chapter 11
20 [or 13], the stay is also intended to give the debtor time to reorganize his assets in order to
21 rehabilitate his business [or personal financial affairs]. . . . “In certain cases, however, the stay
22 may work an inequity on creditors. If so, the creditor may obtain *relief from the stay* under 11
23 U.S.C. § 362(d) (1982). Such relief is granted (1) for cause, . . . The *debtor’s lack of good faith*
24 *in filing a bankruptcy petition* has often been used as cause for *removing the automatic stay*.” (*In*
25 *re Arnold* 806 F.2d 937, 939 (9th Cir. 1986), citations omitted, italics added.) If it is obvious that
a debtor is attempting unreasonably to deter and harass creditors in their bona fide efforts . . . ,
good faith does not exist. (*In re Arnold, supra*, citing *In re Thirteenth Place, Inc.*) 30 B.R. 503,
504 (Bankr.App.9th Cir. 1983). “To determine if a petition has been filed in bad faith courts are

¹ Movant requests that this Court take judicial notice of Movant’s Objection to Confirmation, which was dated, filed and docketed with this Court on July 7, 2011, as docket item #16, and the Declaration of Selwyn D. Whitehead in Support of Movant’s Objection to Confirmation and Exhibits, which were dated, filed and docketed with this Court on July 9, 2011 as docket item #19. These papers more fully develop Movant’s bad faith arguments.

1 guided by the standards used to evaluate whether a plan has been proposed in bad faith. . . . To
2 determine bad faith a bankruptcy judge must review the 'totality of the circumstances.' . . . A
3 judge should ask whether the debtor 'misrepresented facts . . . [or] unfairly manipulated the
4 Bankruptcy Code,' . . . Bad faith exist where the debtor only intended to defeat state court
litigation." *Eisen v. Curry (In re Eisen)*, 14 F.3d 469, 470 (9th Cir. 1994).

5 10. Here, Debtors' have misrepresented the facts in their petition and schedules in an
6 attempt to unfairly manipulate the Bankruptcy Code and have shown their bad faith by filing
their bankruptcy to defeat Movant's pending state court litigation.

7 11. By reason of the foregoing, Movant is entitled to relief from stay under 11 United
8 States Code § 362(d)(1) for cause. If Movant is not permitted to continue the above-mentioned
9 pending state court litigation, Movant will suffer further irreparable injury, loss and damage.
10 Granting said Motion for Relief for continuance of the state court litigation will curtail additional
11 suffering, further irreparable injury, loss and damage.

12 **COUNT II – RELIEF FROM STAY – CAUSE – CONGRESSIONAL POLICY**
13 **FAVORING PLAINTIFF'S CHOICE OF FORUM**

14 12. 11 U.S.C. Sec. 362(d)(1) allows relief from the automatic stays provided by §
15 362(a) for "cause." "Because there is no clear definition of what constitutes 'cause', discretionary
16 relief from the stay must be determined on a case by case basis." In this case, several factors
17 constitute "cause." Most notably, the clear congressional policy to give state law claimants a
18 right to have claims heard in state court. See 28 U.S.C. §1334(c). See *In re Castlerock Props.*,
19 781 F.2d 159 (9th Cir. 1986). And that right to have matters decided in state court becomes
20 mandatory were the action in question concerns a personal injury tort. See 28 U.S.C.
§157(b)(2)(O). An analogy to the bankruptcy court's abstention and remand analysis process is
appropriate here.

21 13. Bankruptcy Courts *may*, and sometimes *must* abstain from hearing disputes that
22 are only tangentially related to the bankruptcy case. (See 28 U.S.C. §1334(c); *In re Tucson*
23 *Estates, Inc.* 9th Cir 1990 912 F.2d 1162, 1169.).

24 **A. Discretionary Abstention Under 28 U.S.C. §1334(c)(1)**

25 14. Discretionary abstention under § 1334 applies to both core and noncore
proceedings. (See 28 U.S.C. §1334(c)(1) – court may abstain from hearing proceedings “arising

under title 11 or arising in or related to a case under title 11”).

A bankruptcy court may not abstain from hearing a particular action unless the action is currently pending in state court. The grounds for discretionary abstention are found where: (1) the effect (or lack thereof) on efficient administration of the estate if a court recommends abstention; (2) the extent to which state law issues predominate over bankruptcy issues; (3) the difficulty or unsettled nature of applicable law; (4) the presence of a related proceeding commence in state court or other nonbankruptcy court; (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334; (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; (7) the substance rather than the form of an asserted core proceeding; (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgment to be entered in state court with enforcement left to the bankruptcy court; (9) the burden of the bankruptcy court’s docket; (10) the likelihood that commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties; (11) the existence of a right to jury trial; and (12) the presence in the proceeding of nondebtor parties. (*In re Tucson Estates, Inc.* 912 F.2d 1162, 1167 (9th Cir. 1990); *In re Eastport Assocs.* 935 F.2d 1071, 1075-1076 (9th Cir. 1991); *In r Lazar* 200 B.R. 358, 372 (CD CA 1996)).

At bottom, the question is committed to the sound discretion of the bankruptcy judge. *McCarthy v. Prince*(*In re McCarthy*), 230 B.R. 414, (9th Cir. BAP 1999). According to the Honorable Leslie Tchaikovsky (Retired), among other authorities, “cases decided under the abstention statute are persuasive authority for determining whether a removed action should be remanded [or allowed to proceed in state court by lifting the stay].” *Lorence v. Pepler* (*In re Diversified Contract Services*), 167 B.R. 591, 596 (ND CA 1994). The factors that must be considered for remand or abstention in this instance are the same. They are:

- a. the court’s duty to decide matters properly before it;
- b. the plaintiff’s choice of forum as between state and federal courts;
- c. the nature of the claim or claims, that is, whether purely state law matters which could be better addressed by the state court are involved;
- d. prejudice to involuntarily removed parties;
- e. comity considerations;
- f. economical and/or duplicative use of judicial resources; and,
- g. effect a remand decision would have on the efficient and economic

1 administration of the estate. *Gorse v. Long Neck Ltd., (Matter of Long Neck, Ltd.)*, 107 B.R. 479
2 (D DE 1988); see also *In re Marathon Home Loans* 96 B.R. 296, 300 (ED CA 1989) (recognized
3 equitable ground include fairness, judicial economy, forum non conveniens, prompt and final
4 resolution of disputes, and respect for state courts on question of state law).

5 15. Here, Movant's has selected the state court as her forum of choice. The
6 proceeding is in question involves matters that are purely state law questions – Hostile
7 Environment, Sexual Harassment, Failure To Prevent Discrimination And Harassment,
8 Retaliation And Wrongful Termination In Violation Of Public Policy Litigation. Movant is
9 prejudiced by having her state court matter, which is ready for trial, stayed in bankruptcy court.
10 Comity favors allowing this state court litigation to proceed in state court and extracting this
11 matter from Debtor's bankruptcy will have little if any effect on the administration of the
12 bankruptcy estate. In sum, fairness, judicial economy, forum non conveniens, the ability for
13 prompt and final resolution of the parties' disputes, as well as the respect for state courts on
14 question of state law weigh in favor of lifting the stay on discretionary abstention grounds.

15 **B. Mandatory Abstention Under 28 U.S.C. §1334(c)(2)**

16 16. Mandatory abstention is required where the proceeding in question is “based upon
17 a State law claim or State law cause of action, related to a case under title 11 but not arising
18 under title 11 or arising in a case under title 11, with respect to which an action could not have
19 been commenced in a court of the United States absent jurisdiction under this section ... if an
20 action is commenced, and can be timely adjudicated, in a State forum of appropriate
21 jurisdiction.” (See U.S.C. § 1334(c)(2)). Mandatory abstention under 1334 applies to
22 proceedings commenced in state court where the court finds that: (1) the abstention motion is
23 timely made; (2) the proceedings involves a purely state law question; (3) the proceeding is
24 noncore and merely “related to” the bankruptcy case; (4) no independent federal jurisdiction
25 exists for the proceeding absent filing of the bankruptcy petition; (5) an action was commenced
in state court; (6) the proceeding can be timely adjudicated in state court; and, (7) jurisdiction is
appropriate in state court. (*In re Lazar* CD CA 1996) 200 B.R. 358, 370; *In re Conejo*
Enterprises, Inc., 71 F.3d 1460, 1464 (9th Cir. 1995); *In re Kold Kist Brands, Inc.* (CD CA
1993) 158 B.R. 175, 178); *In re World Solar Corporation.*, 81 B.R. 603, 606 (SD CA 1988); *In*
re Baldwin Park Inn Assoc., 144 B.R. 475 (CD CA 1992).

17. Here, Movant's motion is timely in that it is filed within two months of the

1 bankruptcy case filing on May 27, 2011 and within one month of the meeting of the creditors on
2 July 7, 2011. The proceeding Movant desires to recommence in state court involve purely state
3 law questions – Hostile Environment, Sexual Harassment, Failure To Prevent Discrimination
4 And Harassment, Retaliation And Wrongful Termination In Violation Of Public Policy
5 Litigation. As such and as “personal injury torts” excepted from inclusion as a core matter in 28
6 U.S.C. § 157 (b)(2)(O), the litigation in question is noncore and merely “related to” the
7 bankruptcy case and therefore, has no independent federal jurisdiction absent the Debtor’s filing
8 their bankruptcy petition. As stated above, the proceeding Movant desires to recommence was
9 commenced in the Superior Court of the State of California for the County of San Mateo on June
10 18, 2010. Superior Court has the expertise to timely adjudicate the subject matter and is
11 therefore the most appropriate jurisdiction to hear the matter.

12 18. Finally, as personal injury tort and wrongful death claims are excluded from
13 Bankruptcy Court jurisdiction, Movant’s Hostile Environment, Sexual Harassment, Failure To
14 Prevent Discrimination And Harassment, Retaliation And Wrongful Termination In Violation Of
15 Public Policy claims must either be tried in district court or state court. See 11 U.S.C. §
16 157(b)(5). This special status is the result of Congress’ awareness that personal injury tort and
17 wrongful death victims do not voluntarily enter into dealings with debtors and accept the risk of
18 loss in the same sense as traditional bankruptcy claimants. See *In re Poole Funeral Chapel, Inc.*,
19 63 B.R. 527, 530 (ND AL 1986). Sexual harassment claims are personal injury claims within the
20 meaning of § 157(b); *Stranz v. Ice Cream Liquidation, Inc. (In re Ice Cream Liquidation, Inc.)*,
21 281 B.R. 145 (D CT). Therefore, this Court is subject to the mandatory abstention provisions of
22 28 U.S.C. § 1334(c)(2).

23 19. Thus, Movant has provided the rationale, both for discretionary and mandatory
24 abstention and that either basis standing alone, constituting “cause” for lifting the stay to allow
25 the state court action to proceed to judgment in a nonbankruptcy forum. (See *In Re Universal
Life Church, Inc.* 127 B.R. 453, 455 (ED CA 1991).

CONCLUSION

26 20. By reason of the foregoing, Movant is entitled to relief from stay under 11
27 United States Code § 362(d)(1) for cause. Further, if Movant is not permitted to continue
28 the above-mentioned pending litigation, Movant will suffer further irreparable injury, loss

1 and damage. Granting said Motion for Relief for continuance will circumvent additional
2 suffering, further irreparable injury, loss and damage.

3 WHEREFORE, Movant, Crystal Deligatti, moves that the stay pursuant to 11 U.S.C. §
4 362 be lifted to permit the pending Hostile Environment, Sexual Harassment, Failure To Prevent
5 Discrimination And Harassment, Retaliation And Wrongful Termination In Violation Of Public
6 Policy Litigation to continue and allow her to pursue any other remedies that she might have
under state law with respect to recovering a claim against the Debtors that arose before the
commencement of the instant bankruptcy case.

7
8 Dated: July 25, 2011

Respectfully Submitted,

9 LAW OFFICES OF SELWYN D. WHITEHEAD

10 /s/ Selwyn D. Whitehead, Esq.
11 SELWYN D. WHITEHAD, ESQ.
12 Attorney for Creditor
CRYSTAL DELLIGANTTI

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CERTIFICATE OF SERVICE

I, Selwyn D. Whitehead the undersigned, declare :

I am employed in the City of Oakland, County of Alameda, California. I am over the age of 18 years and not a party to this action. My business address is 4650 Scotia Avenue Oakland, CA 94605. On July 25, 2011, I served the following document(s):

(1) MOTION FOR RELIEF FROM STAY
(2) NOTICE OF HEARING ON MOTION FOR RELIEF FROM STAY; and,
(3) DECLARATION OF ANDREW M. AGTAGMA IN SUPPORT OF MOTION FOR RELIEF FROM STAY

on each party listed below in the manner or manners described below and addressed as follows:

Service Via U.S. Mail:

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C/O Andrew M. Agtagma, Esq.

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Chambers Copy

The Honorable Thomas E. Carlson

United States Bankruptcy Court

For the Northern District of California

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MOTION FOR RELIEF FROM STAY

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I am readily familiar with the business practices of the Law Offices of Selwyn D. Whitehead, for the collection and processing of correspondence for mailing with the United States Postal Service and that correspondence is deposited with the United States Postal Service that same day in the ordinary course of business by placing a true copy thereof enclosed in a sealed envelop via postage pre-paid, regular first class mail and/or electronic service via the Court's ECF System.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 25th day of July, 2011 at Oakland, California.

/s/ Selwyn D. Whitehead, Esq.
SELWYN D. WHITEHAD, ESQ.